

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

SEAN McTERRELL,

Plaintiff,

v.

18-CV-1028JLS(Sr)

CARL J. KOENIGSMANN, *et al.*,

Defendants.

DECISION AND ORDER

This case was referred to the undersigned by the Hon. John L. Sinatra, Jr., pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. #50 & Dkt. #88.

Following multiple attempts to amend the complaint, the Court granted plaintiff's motion for appointment of counsel for the limited purpose of drafting an amended complaint, which was filed on November 13, 2020. Dkt. #59 & Dkt. #70.

Following service of the amended complaint, several defendants moved to dismiss. Dkt. #84. By Report, Recommendation and Order ("R&R"), entered August 18, 2021, the Court recommended that: (1) the fourth cause of action for denial of medical treatment for plaintiff's kidney failure against Dr. Williams, Dr. Laskowski and Nurse Graf at the Attica Correctional Facility ("Attica"), be dismissed for failure to allege that defendants were aware that plaintiff had been diagnosed with kidney failure; (2) the

twelfth cause of action alleging that Nurse Sault filed false disciplinary charges against plaintiff be dismissed because it was not clearly established that plaintiff was engaging in constitutionally protected speech when he threatened to file a grievance against Nurse Sault; (3) the fourteenth cause of action alleging that Dr. Koenigsmann and Dr. Morley were deliberately indifferent to plaintiff's medical needs be dismissed for lack of personal involvement; and (4) plaintiff's claims against individual defendants in their official capacities be dismissed. Dkt. #95. The R&R further recommended that leave to amend the fourth and fourteenth causes of action be postponed until initial discovery was provided to plaintiff so that any additional changes that might be prompted by such discovery could be considered at the same time, thereby preventing additional delay caused by multiple motions to amend. Dkt. #95. By Decision and Order ("Decision"), entered October 5, 2021, Judge Sinatra adopted the R&R. Dkt. #100.

On October 15, 2021, plaintiff moved for an extension of time to object to the Decision, asserting that he had new information to present against several defendants. Dkt. #103. On October 25, 2021, plaintiff moved for an extension of time to object to the Decision and present new proof. Dkt. #104. On January 7, 2022, plaintiff filed a motion to stay seeking review of the Decision. Dkt. #113. On February 9, 2022, plaintiff requested an extension of time to amend his complaint. Dkt. #117. As set forth in the R&R, plaintiff will be permitted to amend his complaint to address the factual deficiencies identified in the R&R. Dkt. #95. Accordingly, these motions are denied as moot.

On November 29, 2021, plaintiff filed a motion to appoint counsel and to consolidate cases. Dkt. #109. Plaintiff does not proffer any reason for his request for assignment of counsel. Dkt. #109. Because plaintiff was appointed counsel to assist him in drafting his amended complaint and because there does not appear to be any basis to appoint counsel at this stage of the proceeding, plaintiff's motion for appointment of counsel is denied without prejudice. Plaintiff's motion to consolidate cases is also denied because this Court lacks jurisdiction over claims pending before the New York State Court of Claims and because the Western District of New York is not the proper venue for claims relating to the Five Points Correctional Facility ("Five Points"), and Fishkill Correctional Facility.

On March 14, 2022, plaintiff moved to amend his complaint to add his appointed counsel as a defendant in this action and to compel initial disclosures. Dkt. #119. In support of this motion, plaintiff alleges that appointed counsel failed to obtain information for him as plaintiff instructed and failed to include claims relating to his incarceration at Five Points. Dkt. #119. Because counsel was appointed in this matter for the limited scope of drafting an amended complaint with respect to allegations that occurred within the Western District of New York during the time frame of plaintiff's original complaint, plaintiff's motion to amend his complaint to add his appointed counsel as a defendant in this action is denied. As to discovery, the Court notes that the Preliminary Pretrial Conference to set a Case Management Order for discovery was postponed at plaintiff's request.

On June 15, 2022, plaintiff filed a motion to sanction the Attorney General for the State of New York for failing to comply with this Court's Orders; to expedite consideration of his motions so that this case can move forward; to obtain a copy of the amended complaint; and to add defendants. Dkt. #121. As set forth above, the Preliminary Pretrial Conference was postponed pending resolution of plaintiff's motion to stay. Dkt. #115. As a result, a Case Management Order has yet to be entered in this matter. Accordingly, there is no basis for sanctions against counsel for defendants.

The Clerk of the Court is directed to mail plaintiff a copy of the Amended Complaint at Dkt. #70.

As explained previously, the Case Management Order will set a deadline for initial disclosures, after which plaintiff may move to amend his complaint.

The Preliminary Pretrial Conference is set for **August 17, 2022 at 10:30** am. The Assistant Attorney General is directed to contact Five Points and arrange for plaintiff to have access to a telephone and plaintiff's legal papers at that time. The Assistant Attorney General should advise the facility of the following instructions to follow when calling the Court for the conference and should utilize the same instructions:

Dial (866) 434-5269

Access Code: 6142922 #

On July 25, 2022, plaintiff filed a motion seeking a settlement conference. Dkt. #122. The Court will address the potential for settlement at the Preliminary Pretrial Conference.

SO ORDERED.

**DATED: Buffalo, New York
July 28, 2022**

**s/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge**